INDEX

	Page
TABLE OF AUTHORITIES	ii - iv
JURISDICTION	1
QUESTIONS PRESENTED	2
ADDITIONAL CONSTITUTIONAL, STATUTORY AND PROCEDURAL PROVISIONS INVOLVED	2-5
STATEMENT OF THE CASE	5-8
ARGUMENT	8-25
I. Petitioner's Petition for Writ of Certiorari should be denied because the decision sought to be reviewed is not a decision of the highest court in Florida wherein a decision could be had as required by 28 U.S.C. §1257(3)	8-15
II. The Board of Review of the Florida Industrial Commission and the District Court of Appeal, Third District of Florida did not violate Article Six or the Fourteenth Amendment to the United States Constitution by denying Petitioner benefits under the Florida Unemployment Compensation Act	15-25
CONCLUSION	25
CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

	Page
Constitution of the United States:	
U.S.C.A. Const, Art. VI § 2	2, 15
U.S.C.A. Const. Amend. XIV, § 1	2, 12, 15
Statutes of the United States:	
28 U.S.C.A. § 1257	1, 2, 3, 8, 14
29 U.S.C.A. § 141 *et.seg.*	6, 7, 22
29 U.S.C.A. § 160(c)	23
Florida Constitution:	
29 F.S.A. Const. Art. V, §4 (2)	3, 4, 11, 12, 13
Florida Statutes:	
15 F.S.A. § 443.06 (4)	2, 7, 15
15 F.S.A. § 443.07 (4) (c), (e)	4, 8, 9, 10
15 F.S.A. § 443.07 History and Source of Law	9, 10
F.S.A. Ch. 35	10
Florida Appellate Rules:	
31 F.S.A. Fla. App. R. §2.1 (a) (5) (b)	4, 11, 12, 13
31 F.S.A. Fla. App. R. §4.5 (c) (6)	4, 13

TABLE OF AUTHORITIES (cont.)

Cases:	Page
A.F.L. v. Swing, 61 S.Ct. 568, 312 U.S. 321 (1940)	21
Bakery & Pastry Drivers & Helpers Local 802, International Brotherhood of Teamsters v. Wohl, 62 S.Ct. 816, 315 U.S. 769 (1942)	21
Columbia River Packers Ass'n v. Hinton, 62 S.Ct. 520, 521, 522, 350 U.S. 143 (1942)	20
Foley v. Weaver Drugs, Inc., 168 So.2d 749 168 So. 2d 749 (Fla.Sup.Ct. 1964)	14
Fontainebleau Hotel, Inc. v. Forty-Five, Twenty-Five Inc., 168 So.2d 319 (Fla.Sup.Ct. 1964)	14
Gore et al v. Florida Industrial Commission, 181 So.2d 233 (3rd Dist.Ct.App. 1965)	20
Gormon v. Washington University, 62 S.Ct. 962, 316 U.S. 98, *rehearing den.* 625 S.Ct. 1272, 316 U.S. 711 (1942)	15
Gothill v. Sills, 84 S.Ct. 187, 375 U.S. 79 (1963)	15
Hammerstein v. Superior Court of Calif., 71 S.Ct. 820, 341 U.S. 419, *rehearing den.* 72 S.Ct. 21, 342 U.S. 843 (1951)	15
Hoisington v. Kulchian, 172 So.2d 585 (Fla. Sup. Ct. 1965)	14
In Re Abernathy, 130 S.E.2d 292 (N.C.Sup.Ct. 1963), *cert. den., app.dism.*, 84 S.Ct. 274, 375 U.S. 161 (1963)	17, 18, 22

TABLE OF AUTHORITIES (cont.)

	Page
In Re Quarles, 15 S.Ct. 959, 158 U.S. 532 (1895)	20
Jacksonville Paper Co. v. Johnson, 55 So.2d 906 (Fla. Sup.Ct. 1952)	10
Johnson v. White Swan Laundry, 41 So.2d 874 (Fla. Sup.Ct.1949)	21
Marine Cooks & Stewards, AFL v. Panama S.Co., 80 S.Ct. 779, 783, 362 U.S. 365 (1960)	20
Meyers v. Florida Industrial Commission, 117 So.2d 216 (2nd Dist.Ct.App.1959)	20
N.L.R.B. v. Jones & Laughlin Steel Co., 57 S.Ct. 615, 301 U.S. 1 (1937)	19
N.L.R.B. v. McGahey, 233 F.2d 406 (5th Cir. 1956)	19
N.L.R.B. v. Washington Aluminum Co., 82 S.Ct. 1099, 370 U.S. 9 (1962)	23
Order of Railroad Telegraphers v. Chicago & N.W. R.Co., 80 S.Ct. 761, 362 U.S. 330 (1960)	19, 20
Post Times Co. v. Turner, 123 So.2d 359 (1st Dist. Ct.App. 1960)	20
San Diego Building Trades Council v. Garmon, 79 S.Ct. 773, 359 U.S. 236 (1959)	23, 24
Sherbert v. Verner, __ S.Ct. __, 374 U.S. 398 (1963)	20

TABLE OF AUTHORITIES (cont.)

	Page
Sinclair Refining Co. v. Atkinson, Ind., 82 S.Ct. 1328, 1331, 370 U.S. 1952 (1962)	20
State v. Cruz, 189 So.2d 882 (Fla.Sup.Ct. 1966)	13
Thornhill v. State of Alabama, 60 S.Ct. 736, 310 U.S. 88 (1940)	21
Unempl. Compensation Comm'n. v. Aragon, 67 S.Ct. 24, 329 U.S. 143 (1946)	16, 17, 20, 22
Young Spring & Wire Corp. v. Smith, 168 So.2d 540 (Fla. Sup.Ct. 1964)	14
Zirin v. Charles Pfizer Co., 128 So.2d 594 (Fla.Sup. Ct. 1961)	13

Secondary Sources:

16 *C.J.S.* Const. Law §3, §68	24
16 *C.J.S.* Const. Law §213	21
81 *C.J.S.* Social Security and Public Welfare §81	16

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1032

MINNIE E. NASH,

Petitioner,

v.

FLORIDA INDUSTRIAL COMMISSION, THE STANLEY WORKS and STANLEY BUILDING SPECIALTIES,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Jurisdiction of this Court is not invoked by 28 U.S.C. §1257(3) because the decision of the District Court of Appeal, Third District of Florida, which Petitioner seeks to have this Court review is not a judgment or decree rendered by the highest court in Florida in which a decision could be had.

QUESTIONS PRESENTED

1. Whether the Supreme Court of the United States may entertain Petitioner's Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District?

2. Whether Florida Statute §443.06(4) as applied to Petitioner in the decision below abridged Petitioner's privileges and immunities in violation of the Fourteenth Amendment of the United States Constitution?

3. Whether the decision below violated Article VI; Clause 2 of the United States Constitution?

ADDITIONAL CONSTITUTIONAL, STATUTORY AND PROCEDURAL PROVISIONS INVOLVED

28 U.S.C.A. §1257:

"Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against the validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties

or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States . . . ."

Florida Constitution, Article V, §4(2):

"Appeals from trial courts may be taken directly to supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The supreme court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

> Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law." 26 F.S.A. Const. Art. V, §4(2).

Florida Statutes (1965) §443.07(4)(e):

> "Judicial Review.—Orders of the board of review entered pursuant to paragraph (c) of this subsection shall be subject to review only by petition for writ of certiorari to the district court of appeal in the appellate district in which the issues involved were decided by an appeals referee and the Florida industrial commission shall be made a party respondent to every such proceeding." 15 F.S.A. §443.07(4)(e).

Florida Appellate Rules (1965) §2.1(a)(5)(b):

> "(b) Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon

> the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or federal Constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law". 31 F.S.A. Fla. App. R. §2.1 (a)(5)(b).

Florida Appellate Rules (1965) §4.5(c)(6):

> "'Where any decision of a district court of appeal (1) affects a class of constitutional or state officers, or (2) passes upon a question certified by such district court to be of great public interest or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decisions.' '31 F.S.A. Fla. App. R. §4.5(c)(6).

STATEMENT OF THE CASE

The facts out of which this cause arises were stipulated to on December 22, 1965, between all the parties

to said cause and appear on pages 10, 11 and 12 of the Transcript of Testimony.[1]

Respondent specifically adopts the first four paragraphs of Petitioner's STATEMENT OF THE CASE. Respondent adopts the remainder of Petitioner's STATEMENT OF THE CASE except as indicated below.

On April 6, 1965, Petitioner's union filed unfair labor practice charges against Respondent claiming that Respondent's refusal to allow some 50 striking employees to return to work was in violation of the National Labor Relations Act, as amended. Petitioner was a member of said union and a member of the class of employees which caused this unfair labor practice charge to be filed against Respondent. Said charges were still pending before and unresolved by the National Labor Relations Board at all times germane to this cause (R. 12, 19).

After having participated in the strike against Respondent Petitioner was recalled to work on or about April 14, 1965. On May 14, 1965, Petitioner was laid off for what Respondent claimed to be economic reasons.

On May 17, 1965, Petitioner applied for unemployment compensation benefits under Florida Statutes, Chapter 443, and began receiving benefits effective May 16, 1965 (R. 1, 17).

On or about June 17, 1965, Petitioner contested the legality of her layoff by causing to be filed in her behalf an unfair labor practice charge against Respondent,

[1]The Transcript of Testimony has been filed as part of the official record herein, and citations to said Transcript will be indicated by a capital "R", followed by the appropriate page number.

claiming that: (1) her layoff was due to her activities in behalf of the union in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended; (2) she is entitled to full and immediate reinstatement to her former or an equivalent position; and, (3) she is entitled to back pay from Respondent for all wages lost because of her layoff (R. 12).

At all times germane to this cause, Petitioner has asserted before the National Labor Relations Board that her layoff was unlawful inasmuch as she was laid off because of her activities in behalf of the union and her participation in the earlier strike against Respondent.

At all times germane to this case, the unfair labor practice charge filed in behalf of Petitioner on June 17, 1965, was pending before and unresolved by the National Labor Relations Board.

The Board of Review of the Florida Industrial Commission, in upholding the Appeals Referee's Decision, found that Petitioner was not entitled to unemployment compensation during the period from June 17 to October 5, 1965, because her unemployment was due to a labor dispute in active progress at the premises at which she was last employed within the meaning of Florida Statute § 443.06(4), (R. 33, 40).

Thereafter, Petitioner filed her Petition for Certiorari directed to the Florida Industrial Commission, in the District Court of Appeal of Florida, Third District, pursuant to Florida Statute 443.07(4)(3).

Petitioner did not file a petition for rehearing with

the Third District Court of Appeal for Florida, nor, did Petitioner request that Court to certify the instant issues to the Florida Supreme Court. Petitioner did not attempt to have the District Court of Appeal's Decision reviewed by the Florida Supreme Court either by certiorari or appeal, but is attempting by its current Petition to have this Honorable Court grant direct review of the lower Florida appellate court's decision.

ARGUMENT

I. Petitioner's Petition for Writ of Certiorari should be denied because the decision sought to be reviewed is not a decision of the highest court in Florida wherein a decision could be had as required by 28 U.S.C. §1257(3).

While Florida Statute §443.07(4)(e) provides that the District Courts of Appeal have exclusive jurisdiction to *entertain* reviews from orders of the Board of Review of the Florida Industrial Commission, it contains no language nor does it infer any conclusion that the District Court of Appeal are courts of final review of such matters.

The statute provides in part:

> "Orders of the Board of Review—shall be subject to review only by petition for writ of certiorari to the district court of appeal. . . ." F.S.A. §443.07(4)(e).

Clearly this language itself does not buffer a District Court's decision from further appropriate review by the Florida Supreme Court. It merely indicates that the

initial appellate review of an order by the Board of Review of the Florida Industrial Commission shall be before a District Court of Appeal, not the Florida Supreme Court, a Circuit Court or any other of the State's courts. Had the Florida Legislature intended to make the District Courts of Appeal the courts of final determination in unemployment compensation matters, it most certainly would have done so by so providing in the statute itself. The absence of such a limiting provision clearly indicates the legislature's intent that a District Court of Appeal's review of an order of the Board of Review is subject to the same scrutiny by the Florida Supreme Court as any other decision of a District Court of Appeal.

The legislative history of Florida's Unemployment Compensation Act clarifies the issue.

Under the Unemployment Compensation Act of 1937, court review of the decision of the Board of Review was had:

> " . . . [B]y commencing an action in a court of competent jurisdiction against the Commission for the review of such decision. . . ." F.S.A. §443.07, History of Source of Law at 428.

Prior to the 1957 amendments of the Unemployment Compensation Act, Florida Statute §443.07(4)(e) provided for judicial review as follows:

> "(e) Judicial Review.—
>
> 1. Within the time specified in paragraph (c) of this subsection, the Commission, or any party

> to the proceedings before the board of review, may obtain judicial review thereof by filing in the circuit court of the county in which the party resides, or in the circuit court of Leon County, Florida, a petition for review of such decision. . . . " F.S.A. §443.07, History and Source of Law at 431.

In the amendments to the Act in 1957, the statute was changed to its current reading. *Infra* at 4.

It is clear that by amending the judicial review portion of the statute, the Florida Legislature merely changed the court of initial appellate review of unemployment compensation actions from the Circuit Courts to the District Courts of Appeal. It is also significant to note that the changing of the court of initial appellate review occurred during the same session of the Florida Legislature in which the District Courts of Appeal for the State of Florida were created. F.S.A. Ch. 35.

Further, there is no doubt but that prior to 1957 decisions rendered by the Circuit Courts in reviewing orders of the Board of Review were subject to review by the Supreme Court of Florida. *Jacksonville Paper Co. v. Johnson*, 55 So.2d 906 (1952). The current statute did not lessen the Florida Supreme Court's appellate jurisdiction of such matters.

From the legislative history, it is clear that in enacting the current statute, the legislature of Florida intended merely to change the court of initial appellate review for decisions by the Board of Review of the Florida Industrial Commission to the newly created District Courts

of Appeal. There is not the slightest indication that the legislature intended such decisions of the District Courts of Appeal, unlike all other decisions by such courts, to be the final, unreviewable decisions of the State of Florida's judicial system. Consequently, Petitioner's assertion that the decision of the Third District Court of Appeal in the instant cause was the decision of the highest court in Florida wherein a decision could be had is clearly without merit.

The fact is that Petitioner could have had the Third District Court's decision reviewed in the Florida Supreme Court. Fla. Const., Art. V §4(2); Fla. App. R. §2.1(a)(5)(b).[2]

Article V, §4(2) of the Florida Constitution concerns itself with the appellate jurisdiction of the Florida Supreme Court:

> "Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a

[2]Petitioner asserts that the decision of the District Court of Appeal being *per curiam* in nature precluded Petitioner from proceeding to the Supreme Court of Florida under Article V, §4 of the Florida Constitution and Appellate Rule 2.1(b). In the first place, Florida Appellate Rule 2.1(b) has nothing to do with petitions for certiorari, denials thereof, or appeals, but deals exclusively with the office and duties of the Clerk of Supreme Court of Florida. 31 F.S.A. Fla. App. R. §2.1(b). Further, Article V, §4 of the Florida Constitution contains nothing which even remotely supports Petitioner's assertion. *Infra* at 3.

> class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with the decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law". Fla. Const., Art. V, §4(2).

Florida Appellate Rule 2.1(a)(5)(b), contains the identical language of Article V, §4(2) of the Florida Constitution as cited above. 31 F.S.A. Fla. App. R. 2.1(a)(5)(b).

On the face of the Constitution and the applicable Florida appellate rule, it is apparent that Petitioner herein could have appealed to the Florida Supreme Court from the decision of the Third District Court inasmuch as by Petitioner's own admission that Court passed initially on the validity of a state statute, and initially construed it in light of the Fourteenth Amendment of the Federal Constitution.[3]

Consequently, Respondent contends that Petitioner could have appealed the District Court of Appeal's decision to the Florida Supreme Court as a matter of right.

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[3]In its Brief in the District Court of Appeal, Third District of Florida, in this same cause, Petitioner asserted:

> "To disqualify her subsequently solely because she files an unfair labor practice charge violates the Constitution of the United States, logic, and the policy of the Unemployment Compensation Law." (Reply Brief of Petitioner, p.8)

In said reply Brief, Petitioner fully argues its position that the Board of Review's application of Florida Statute 443.06 is unconstitutional as it abridges Petitioner's rights and priviliges under the "privileges and immunities" clause of the Fourteenth Amendment of the United States Constitution.

Also, reviewing Article V, §4(2) of the Florida Constitution and the Florida Appellate Rules 2.1(a)(5)(b) and 4.5(c)(6), it is clear that Petitioner could have requested the District Court of Appeal to certify the current issues to the Supreme Court of Florida as being questions of great public interest. *Zirin v. Charles Pfizer Co.*, 128 So.2d 594 (Fla.Sup.Ct. 1961). Had the District Court of Appeal been requested to certify such questions, and had it done so, there is no doubt but that the Supreme Court of Florida could have reviewed the District Court of Appeal's decision. *State v. Cruz*, 189 So.2d 882 (Fla.Sup.Ct. 1966); *Zirin, supra.*

However, it is clear that Petitioner herein did not even seek to have the District Court of Appeal certify the instant questions. That being the case, Respondent submits that Petitioner did not exhaust its state remedies, and further submits that the attempt to have such questions certified and the denial of such request is a condition precedent to any right that Petitioner might have to have this Honorable Court review the decision of the District Court of Appeals, as otherwise the decision is not one of the highest court in Florida wherein a decision could be had.

Petitioner's assertion that the decision of the District Court of Appeals being *per curiam* in nature precluded Petitioner from proceeding to the Florida Supreme Court is without merit. Such assertion clearly is not supported by the Florida Constitution or Florida Appellate Rules. *Infra* at 3-5.

It is true that up until recent years, the Florida Supreme Court consistently refused to grant a petition for

certiorari based on a conflict of decisions between the District Courts of Appeal where the decision sought to be reviewed was a *per curiam* decision. The reasoning appears to be that the decision being *per curiam* in nature, the Florida Supreme Court had no opinion to review from which it could determine whether or not in fact there was a conflict between the districts. However, even this position has been altered by the Florida Supreme Court, and since 1964, the Florida Supreme Court may go behind *per curiam* decisions by District Courts of Appeal even though the basis for the certiorari was a conflict between District Courts on the same point of law. *Fontainebleau Hotel, Inc. v. Forty-Five, Twenty-Five, Inc.*, 168 So.2d, 319 (Fla.Sup.Ct. 1964); *Young Spring & Wire Corp., v. Smith*, 168 So.2d 540 (Fla.Sup.Ct. 1964); *Foley v. Weaver Drugs, Inc.*, 168 So.2d, 749 (Fla.Sup.Ct. 1964); *Hoisington v. Kulchian*, 172 So.2d 585 (Fla.Sup.Ct. 1965).

Petitioner submits that the Florida Constitution, the Florida Appellate Rules and Florida case law clearly indicate that where a petition for writ of certiorari based upon a question certified by a District Court of Appeal to be one of great public interest, or an appeal as a matter of right is sought from a *per curiam* decision of a District Court of Appeal, the Supreme Court of Florida may review said decision. Respondent has found no law to the contrary.

Respondent respectfully submits that Petitioner has not exhausted its state appellate review procedures; that the instant decision of the District Court of Appeals, Third District of Florida, is not a "final judgment or decree rendered by the highest court of a state in which a decision could be had . . . ", within the meaning of 28 U.S.C. §1257(3); and, that, consequently, this Honor-

able Court should not grant the instant Petition. *Gothill v. Sills*, 84 S. Ct. 187, 375 U.S. 79 (1963); *Hammerstein v. Superior Court of Calif.*, 71 Sup.Ct. 820, 341 U.S. 419, *rehearing denied*, 72 S. Ct. 21, 342 U.S. 843 (1951); *Gorman v. Washington University*, 62 S. Ct. 962, 316 U.S. 98, *rehearing denied*, 62 S. Ct. 1272, 316 U.S. 711 (1942).

II. The Board of Review of the Florida Industrial Commission and the District Court of Appeal, Third District of Florida, did not violate Article Six or the Fourteenth Amendments to the United States Constitution by denying Petitioner benefits under the Florida Unemployment Compensation Act.

Petitioner asserts that the State of Florida has abridged Petitioner's privileges of immunities contrary to the Fourteenth Amendment to the United States Constitution by disqualifying Petitioner for unemployment benefits because she filed unfair labor practice charge with the National Labor Relations Board wherein she asserted that she was laid off because of her activity in behalf of the union and/or her union membership and sentiment. *Petition for Writ of Certiorari*, pp. 11-18.

In actuality, the decision of the Board Review of the Florida Industrial Commission denied Petitioner unemployment compensation benefits because her unemployment was due to a labor dispute at the place of her last employment within the meaning of Florida Statute §443.06 (4). *Id.* see Appendix C.

It is clear that a state has the authority to establish unemployment compensation acts by legislative enactment. In so doing, a state legislature has the power to determine the scope of the act and it need not occupy the whole field of unemployment. A legislature may lay down definitions and tests to be applied in the administration of the statute, and these functions fall within a state's police power. 81 *C.J.S.* Social Security and Public Welfare, § 81.

> "In determining the validity of such legislation it is not for the court to determine the merits of the law as enacted by the legislature, or, provided the act has a legitimate end and the means are reasonably related to that end, to question the wisdom or workability of the scheme set up by the legislature, or to say that some plan other than that adopted by the legislature would be preferable, or that experience might demonstrate the economic fallacy of the particular plan promulgated."
>
> "Questions as to the manner of the operation of the act are legislative questions and ordinarily are not within the power of the court to consider and determining the validity of the act." *Id.* at 121.

In *Unemployment Compensation Commission v. Aragon*, 67 S.Ct. 24, 329 U.S. 143 (1946), the United States Supreme Court clarified the state's authority in interpreting and applying its unemployment compensation act, and the scope of appellate review of such state determinations.

> "Here, as in National Labor Relations Board v. Hearst Publications, Inc., 1944, 322 U.S. 111,

131, 64 S.Ct. 851, 860, 861, 88 L. Ed. 1170, the question presented 'is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially.' To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The 'reviewing court's function is limited.' All that is needed to support the Commission's interpretation is that it has 'warrant in the record' and a 'reasonable basis in law'. *(Citations omitted)*

Applying these tests, we are unable to say that the Commission's construction was irrational or without support in the record. The Commission apparently viewed a dispute as 'active' during the continuance of a work stoppage induced by a labor dispute. That agency might reasonably conclude that the unemployment resulting from such work stoppage is not of the 'involuntary' nature which the statute was designed to alleviate, as indicated by the statement of public policy incorporated in the Act by the Territorial Legislature. We see nothing in such a view to require our substituting a different construction from that made by the Commission entrusted with the responsibility of administering the statute'." *Id.* at 250, 251.

The North Carolina Supreme Court in *In Re Abernathy*, 130 S.E.2d 292 (N.C.Sup.1963), *cert. den.,app.dism.* 84 S.Ct. 274, 375 U.S. 161 (1963) stated:

"'When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome,' Sproles v. Binford, 286 U.S. 374, 52 S.Ct. 581, 76 L.Ed.1167;. . . . 'Legislative bodies may distinguish, select, and classify objects of legislation. * * * They may prescribe different regulations for different classes * * *. The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination.' . . .; see also, . . .; Magoun v. Ill. Trust & Savings Bank, 170 U.S. 283, 18 S.Ct. 594, 42 L.Ed 1037; . . .; Steward & Machine Co. v. Davis, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279. The unemployment insurance acts of the states contain certain worker disqualifications, among them, (1) discharge for misconduct, (2) refusal to accept other suitable employment, (3) participation in a strike. The power of the legislature to provide these disqualifications is not challenged. Further disqualifications contained in the 1961 amendment involves a question of degree and not of principle.'" *Id.* at 299.[4]

[4]The Court in *Abernathy* held that the North Carolina Court's interpretation of its Unemployment Compensation Act, which is closely akin to Florida's, so that flight engineers who refused to cross picket lines at Employer's North Carolina operation were not eligible to receive unemployment compensation, was constitutional when tested by the Fourteenth Amendment of the Constitution of the United States.

It is patently clear that in filing of an unfair labor practice charge with the National Labor Relations Board that an employee admits that his unemployment is due to his employer's disagreement with or opposition to the employee's union activities and/or membership. This is the very essence of an unfair labor practice charge contesting the legality of an employee's discharge or layoff, for if the discharge or layoff is not motivated by "anti-union animus" it is not illegal under the National Labor Relations Act, as amended. *N.L.R.B. v. Jones & Laughlin Steel Co.*, 57 S.Ct. 615, 301 U.S. 1 (1937); *N.L.R.B. v. McGahey*, 233 F.2d 406 (5th Cir. 1956). When Petitioner filed an unfair labor practice charge with the National Labor Relations Board she asserted then and there that her unemployment was due to her participation in activities in behalf of the union and/or her membership therein. There is no more classic example of a labor dispute.

That the State of Florida may interpret Petitioner's unemployment to be due to a labor dispute in active progress because she filed an unfair labor practice charge with the National Labor Relations Board, and that such interpretation has "warrant in the record" and a "rational basis in the law", is apparent, particularly in light of the traditional and constitutionally acceptable definitions of a labor dispute.[5]

---

[5]Section 13 (c) of the Norris-Laguardia Act defines a labor dispute as including:

"any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." *Order of Railroad Telegraphers v. Chicago & N.W. R. Co.*, 80 S.Ct.

Therefore, Respondent respectfully submits that the Board of Review's interpretation and application of the clause "'due to a labor dispute" found in Florida Statute, §443.06 (4) so as to deny Petitioner unemployment benefits is logical, reasonable and well supported in the record. Therefore, this Court should refuse to review and/or upset the Board of Review's construction of the statute in question.

Petitioner cites the case of *In Re Quarles*, 15 S.Ct. 959, 158 U.S. 532 (1895) to support its constitutional argument. Respondent respectfully submits that *In Re Quarles* is an inapposite to the present cause as Petitioner seeks enforcement of her private rights. See *Brief for Respondent Florida Industrial Commission* at 14, 15.

Further, Petitioner implies that in *Sherbert v. Verner*, — S.Ct. —, 374 U.S. 398 (1963) this Court held that an employee's right to file an unfair labor practice charge is a "privilege or immunity" within the meaning of the Fourteenth Amendment. Respondent respectfully submits that *Sherbert* does not so hold either directly or by implication.

761, 362 U.S. 330 (1960); See also *Sinclair Refining Co. v. Atkinson, Ind.*, 82 S.Ct., 138, 1331, 370 U.S. 195 (1962); *Marine Cooks and Stewards AFL v. Panama S.Co.* 80 S.Ct. 779, 783, 362 U.S. 365 (1960); *Aragon, supra; Columbia River Packers Ass'n v. Hinton*, 62 S.Ct. 520, 521, 522, 350 U.S. 143 (1942).

Also, the State of Florida has uniformly defined a labor dispute as including:

" . . . [A]ny controversy between employer and employee concerning wages, hours, and working conditions or terms of employment.". *Meyer v. Florida Industrial Commission*, 117 So.2d 216 (2nd Dist.Ct. App. 1959); *Post Times Co. v. Turner*, 123 So.2d 359 (1st Dist.Ct. App. 1960); *Gore et al v. Florida Industrial Commission*, 181 So.2d 233 (3rd Dist. Ct. App. 1965).

Respondent submits that the receipt of unemployment compensation benefits is neither a "privilege or immunity" nor a right entitled to protection under the United States Constitution.

However, even if the "right" to file an unfair labor practice charge and/or the "right" to receive unemployment compensation are protected rights under the United States Constitution the ruling of the State of Florida in the instant cause does not unlawfully, unconstituionally or improperly restrict the exercise of such "rights".

The right to strike and/or picket are probably the working man's most basic tools in the process of self help in the effectuation of the rights guaranteed him under Section 7 of the National Labor Relations Act, as amended. The right to engage in peaceful picketing has been equated to freedom of speech protected from unlawful abridgment by a state by the Fourteenth Amendment to the United States Constitution. *Thornhill v. State of Alabama*, 60 S.Ct. 736, 310 U.S. 88 (1940); *A.F.L. v. Swing*, 61 S.Ct. 568, 312 U.S. 321 (1940); *Bakery and Pastry Drivers & Helpers Local 802 International Brotherhood of Teamsters v. Wohl*, 62 S. Ct. 816, 315 U.S. 769 (1942); *Johnson v. White Swan Laundry*, 41 So.2d 874 (Fla.Sup.Ct. 1949). Further, there is no doubt but that the right to strike, so long as such right is exercised in a lawful manner, is entitled to protection under the Fourteenth Amendment from unreasonable infringement by a state. 16 *C.J.S.* Const. Law §213.

Although federal recognition and protection of such rights is generally accepted, the validity of state unemployment compensation acts which deny employees unem-

ployment compensation benefits when their unemployment is due to participation in striking and/or picketing is almost universally recognized.[6]

By analogy, if a state may hold that an employee who is unemployed because he is participating in these constitutional freedoms may be denied unemployment benefits, it follows axiomatically that a state may hold that an employee may be denied unemployment compensation benefits because he filed an unfair labor practice charge with the National Labor Relations Board. Of course this is true only so long as such disqualification is applied uniformly to all citizens similarly situated. Respondent submits that there is no reason to afford the "right" to file such charges more protection than the recognized right to strike and/or picket.

Such conclusion is further buttressed by the fact that the right to file unfair labor practice charges is created and protected by the same federal law that gives employees the right to strike and/or picket, *i.e.* The National Labor Relations Act, as amended. Consequently, Respondent submits that if a state may constitutionally deny unemployment compensation benefits to an employee who is engaged in striking and/or picketing, the State of Florida may constitutionally deny Petitioner unemployment com-

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[6] *In Re Abernathy, supra; Aragon, supra; The Ruberoid Co. v. Unempl.* Ins. App., 50 LRRM 85 (Calif. Dist.Ct. App. 1962); *Gillan v. Admr. Unempl. Comp. Act.* 50 LRRM 86 (1962); *Achenbach v. Review Bd. of Indiana Empl. Comm'n. Div.*, 49 LRRM 112 (Ind.Sup. Ct. 1962); *Weltner of Kansas Empl. Sec. Bd. of Rev.*, 53 LRRM 98 (Kansas Sup.Ct. 1963); *Johnson v. Kentucky Unempl. Ins. Comm'n.*, 53 LRRM 100 (Ky.Ct. App. 1963); *Wheeler v. Director of Div. of Empl. Sec.* 56 LRRM 148 (Mass. Sup. Jud. Ct. 1964); *Weiss v. Klein Markets, Inc.*, 47 LRRM 90 (Minn. Sup. Ct. 1961); *O'Dell v. Division of Empl. Sec.*, 55 LRRM 131 (Mo. Sup.Ct. 1964); *Marczi v. Bd. of Education*, 46 LRRM 115 (N.J. Sup.Ct. App. Div. 1960), *ad infinitum*

pensation because she filed an unfair labor practice charge with the National Labor Relations Board.

When a state denies an employee unemployment compensation because his unemployment is due to his participation in a strike and/or picketing, the state is not abridging the employee's rights to engage in these activities, but is merely holding that the state will not allow unemployment compensation benefits in such an instance. Similarly, in denying unemployment compensation to Petitioner, the Board of Review did not interfere with Petitioner's "right" to file an unfair labor practice charge, but merely put Petitioner to an election of rights, remedies and forums.

If Petitioner could not receive full redress from the National Labor Relations Board for her "ill treatment", Petitioner's constitutional argument would be more tenable. However, the fact is, should Petitioner prevail before the National Labor Relations Board that federal agency has the power and authority to give Petitioner just what she asks for, *i.e.* reinstatment and back pay. National Labor Relations Act, as amended § 10 (c); *N.L.R.B. v. Washington Aluminum Co.*, 82 S.Ct. 1099, 370 U.S. 9 (1962).

Further, in conjunction with Petitioner's arguments under Article Six and the Fourteenth Amendment, Respondent submits that the decision of the Board of Review of the Florida Industrial Commission and the Florida District Court of Appeal effectuates the principle of federal preemption as first set forth in the case of *San Diego Building Trades Council v. Garmon*, 79 S.Ct. 773, 359 U.S. 236 (1959). That the cause of Petitioner's unemployment is "arguably an unfair labor practice" is made ap-

parent by Petitioner's very act of filing an unfair labor practice charge asserting an illegal motive as the cause for the cessation of her employment.

The general teaching of *Garmon* is that if the activity out of which the cause arises is arguably an unfair labor practice the National Labor Relations Board has exclusive jurisdiction to entertain the cause and remedy the harm. Except in some unusual circumstances, the state and federal courts are directed to "keep hands off".

The decision of the Board of Review would seem to effectuate this policy as it holds, in effect, that when an employee files an unfair labor practice charge with the National Labor Relations Board he claims that the cause of his unemployment is "arguably an unfair labor practice", and when such is the case the Florida Industrial Commission will defer any action concerning his unemployment to the forum which in its expertise is most well equipped to handle and remedy the matter. That forum is the National Labor Relations Board. Respondent submits that such a ruling is clearly constitutional and within the spirit of this Court's decision in *Garmon*.

For reasons enumerated above, Petitioner's argument that the instant decision is unconstitutional under Article Six, Clause Two of the United States Constitution is clearly without merit, as said decision is in no manner in conflict with the Constitution or any law of the United States. 16 *C.J.S.* Const. Law §3, §68.

Finally, Respondent would point out to the Court that there is no showing nor any argument by Petitioner that

the decision at issue herein goes beyond the police power of the State of Florida.

In summary, Respondent respectfully submits that even if this Honorable Court has jurisdiction to entertain Petitioner's *Petition* that the decision of the Board of Review, and the District Court of Appeal's affirmance thereof, are constitutional and well within the boundaries of established federal and state constitutional, statutory, and case law.

Therefore, Respondent respectfully submits that Petitioner's *Petition* should be denied.

CONCLUSION

Respondent respectfully submits that the instant Petition should be denied because (1) jurisdiction to entertain said Petition does not lie in this Court, and, in the alternative, (2) the Petition does not raise any issue, constitutional or otherwise, warranting review by this Honorable Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed to Lawrence Kanzer, Esquire, Attorney for Respondent, Room 161, State Office Building, 1350 N. W. 12th Avenue, Miami, Florida and Richard L. Horn, Esquire, Rutledge & Milledge, 601 Flagler Federal Building, 111 N. E. First Street, Miami, Florida, Attorneys for Petitioner, this 21st day of March, 1967.

W. REYNOLDS ALLEN

W. REYNOLDS ALLEN